

## Critical Incident Analysis and the Semiosphere

### The Curious Case of the Spitting Butterfly

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In January 2007, media outlets across Australia reported the outcome of a local court decision, *Police v Rose* (hereinafter *Rose*).<sup>1</sup> Two security officers employed by RailCorp, then a state-owned corporation, had accused Garry Rose of assault for allegedly spitting and ‘throwing punches’ at them outside Redfern railway station in Sydney. The allegation was referred to the New South Wales Office of the Director of Public Prosecutions (DPP) and came before Magistrate Pat O’Shane. Her Honour found that the offences were not proved and the matter was dismissed.<sup>2</sup> This seemingly trivial event sparked a chain of consequences that culminated in legislative changes to the make-up of the Judicial Commission, the body responsible for the oversight of judges in New South Wales. In the course of the controversy, key players in government failed to observe a cornerstone of Western democracies, the doctrine of the separation of powers.

In this article we reflect on some of the extraordinary features of the case, refracted through a complexity theory lens. The late Edward Lorenz called wild disparities between cause and effect the Butterfly Effect.<sup>3</sup> The term is a scientific-poetic metaphor: in a chaotic system of weather, a butterfly flapping its wings in the Andes can provoke a hurricane in Montana. When Garry Rose spat in the direction of two transit officers he could not have imagined the result, a small—yet seismic—

shift in the constitutional landscape of the oldest and largest state in Australia. This butterfly did not gracefully flap his wings, but his small act had a great and unpredictable effect.

As in most areas of social life, the causal chains did not unfold only in the material sphere. Actions were continually provoked and mediated by the *semiosphere*, the realm where meanings are created and exchanged and circulate via various media, new and old. Lorenz ignored the role of weather reporting and forecasting in his Butterfly Effect; yet weather is inserted into social systems, and mediated by human actions and interpretations, multiple times, every day. In fact, the Butterfly Effect was born inside Lorenz's computer program, which produced deterministic chaos in its flawed attempts to mirror actual weather systems. We extrapolate a general principle for analysing social complexity from this. Exchanges between material actions and the semiosphere are crucial in the production of non-linear causality, and thus meaning, in social life.

#### —CRITICAL INCIDENT ANALYSIS

This study is part of a research project designed around *critical incident analysis*. It aims to channel ideas from chaos and complexity into engaged, critical, interdisciplinary research.<sup>4</sup> Humanities academics in general have found the ideas of chaos and complexity more abstract than usable. There have been notable exceptions, and here we note just three: John Urry from sociology; Brian McNair in the field of communications and journalism; and John Law on the philosophy of science.<sup>5</sup>

Nevertheless, humanities disciplines themselves are often seen as too abstract in their own way, too cumbersome and locked into eternal values, to be easily able to contribute to current debates about pressing issues. To better connect around such limitations, critical incident analysis starts from urgent, topical, concrete objects whose complexity and urgency are built in, not in doubt. But this form of analysis is not intended to be separate from what is being done by humanities academics. We welcome interplay between disciplines, approaches and paradigms. Critical incident analysis is a further option, to add by whatever degree seems right, for whatever purposes are at hand.

For the broader project, the authors collected media coverage of Sydney metropolitan transport systems.<sup>6</sup> The media scan was a prolific generator of *signs* of a critical incident, stemming from the vicissitudes of the Sydney rail system, presided over by (the now decorporatised) RailCorp.<sup>7</sup> Of several media spikes over the study period, the first appeared in January 2007, precipitated by our Spitting Butterfly.<sup>8</sup> As an initial heuristic principle, we used media spikes as an *indicator* of the possible presence of a critical incident. Some media researchers resist this kind of indicator, seeing such spikes only as signs of a beat-up, where media institutions distort social reality, creating the story's salience to serve particular interests. We recognise this as a problem, but it is not so severe for critical incident analysis. Here we use the spike semiotically, not as proof, but as a starting point to an investigation which examines the validity of the sign.

The deeper rationale we give to critical incidents allows us to investigate what may or may not lie behind media spikes. This comes from chaos theory propositions about chaogenic states. For Nobel Prize winner Ilya Prigogine, chaos comes in several forms of what he called 'dissipative systems', complex, dynamic forms of order at the edge of chaos.<sup>9</sup> Far-from-equilibrium conditions are marked by non-linear causality; that is, causes which do not match up precisely to a set of effects, and can be dramatically greater or smaller, along similar lines or with different or even opposite tendencies.

Lorenz's Butterfly Effect is a good example of non-linear causality. Technically he called it 'sensitivity to initial conditions', by which he meant that a very slight difference in how things start, at the moment they are attended to, can have consequences that are not cancelled out, but finally emerge in dramatic effects. These are not 'caused' in a simple way by the initial factor, though the metaphor seems to imply this. The outcome draws its energy from turbulent forces at play in the system, which, however, would not have produced exactly that outcome from any other starting point.

Lorenz makes an even stronger, more interesting claim. The differences that will make a difference in these initial conditions are so small, co-existing with so many others that might have been the triggers, that investigators (or managers or activists or humanities researchers) cannot know in advance what will prove to be decisive. A determinant can only be identified when it begins to have its

characteristic effects. That is why media spikes have diagnostic value, even though not all media spikes will come from a critical incident, and not all critical incidents will emerge as media spikes.

If critical incidents cannot be predicted in enough detail to know where they will happen, and how or if prevention is possible, they may seem a useless object of analysis. However, the unfolding is an illuminating narrative with all the qualities of a good story. The basic elements are familiar, and the outcomes in very general terms come from a predictable repertoire, but the twists and turns along the way are new. More importantly, critical incidents give unique insight into dynamics of a system which are only revealed under this kind of pressure. Critical incidents represent the sites where the smooth operation of the dominant system is disrupted, if only briefly, and where it has to actively recuperate its dominance, and inevitably reveal where that dominance is not itself inevitable.

'Critical' has meaning within two bodies of theory. In social theory, it mostly refers to a stance against the dominant authority and the ideas on which that authority is based. In physics, 'critical' refers to a system at a point of crisis, so unstable that it may break, or bifurcate, into one or more different states. In critical conditions, such forking can happen repeatedly, producing a 'cascade of bifurcations'.<sup>10</sup> Yet the two senses have a point of overlap. Criticality in the physics sense opens up the dominant system to a dynamic scrutiny which is the aim of critical theory in the social sense.

In order to study critical incidents, we have used standard methods of social analysis, including media content and critical discourse analyses of key moments in the story.<sup>11</sup> It is part of our purpose to transparently adapt the tools of humanities researchers for analysing chaos theory hypotheses. We complement these approaches with a relatively new text mining software application, Leximancer.

This software was not devised with critical incident analysis in mind, and researchers find it useful for different purposes. Here, we are interested in how Leximancer may advance understanding of the kind of hyper-complexity that is the focus of our research. One capability of Leximancer, the production of semiospheric maps, is used to plot a course from Redfern Station to the New South Wales Parliament, taking in sites of influence on the way. The course winds about and doubles back on itself as the key players contest the issues in public, ultimately

supporting the idea that a critical incident like this one, an originally small event with large, unforeseeable consequences, reveals something more than law-and-order populism or wedge politics.

—THE BIG PICTURE, OR HOW DID IT GET SO BIG?

A defining feature of a critical incident is its explosive trajectory. It typically expands dramatically in scope from small beginnings to massive, unpredictable consequences. One attraction for us is that this quality is so striking that it will be generally recognised, not needing any elaborate analytic equipment or sophisticated theory to prove its existence. Yet it is useful to be able to be more specific about its typical qualities, for closer examination, so that interpretations can go beyond that immediate recognition.

We begin with a plain narrative, gleaned from available sources, the broad details not in dispute. Between 16 and 30 January 2007, more than twenty articles appeared in the major daily newspapers on *Police v. Rose*. Figure 1 summarises the breakdown of the content.

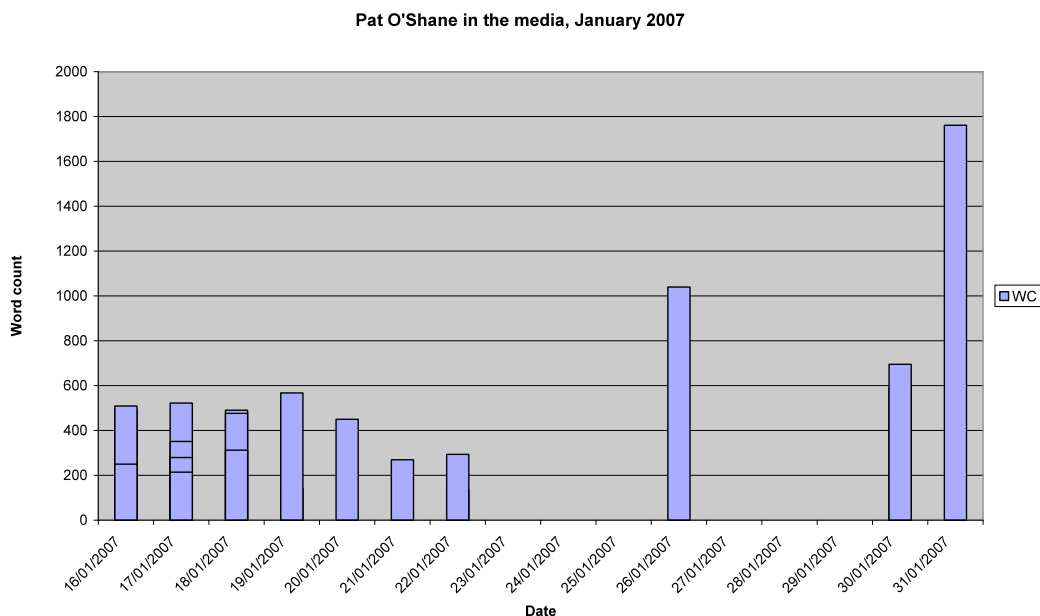


Figure 1: 'Pat O'Shane AND Transit Officers', 16 – 31 January 2007

Source: Major Australian newspapers

This graph falls into three parts. The first phase is over seven days, followed by a spike four days later, and another spike four days after that. The latter are both higher than those in the first period. There are too few items for this graph to be seriously mathematical, but even with this data we detect traces of a significant pattern. If we do not take the gaps into account, the average of each shows an accelerating upwards curve, which then collapses.

This is the signature of a *power law*; that is, a curve in a graph ordered exponentially. Power laws are very common phenomena. They can be relatively flat, or rise steeply. Chaos theorist Per Bak sees them as the marker of criticality, a highly unstable situation where the whole system is liable to bifurcate, to turn sharply around.<sup>12</sup> Whenever a curve rises like this, it reaches a point where it cannot continue to rise anymore, so it is likely to turn around abruptly and fall.

Examining the story behind the figures, the same pattern emerges, even more marked. On 3 July 2006, Garry Rose had his fateful confrontation with the transit officers outside Redfern station. Only these very ordinary individuals were involved. Just two social categories seemed to be intersecting, an Aboriginal man and two uniformed officers, the latter being representatives of the law but not directly of the police or the state. The closed circuit television (CCTV) footage of the confrontation was later produced in court, and a still frame reproduced on the *Daily Telegraph* website.<sup>13</sup> The event was thus already wrapped in one aspect of the semiosphere and implicated in widespread systems of surveillance and the social authority vested in same, ushering in the shadowy presence of two major institutions, the law and the media. None of this was visible in those first moments.

After the confrontation, the legal activities of charging Garry Rose took place. He was caught in the legal system, still not apparently different from many such individuals who come before New South Wales magistrates, Pat O'Shane included. The flat line representing this activity continued to 15 January, when the case was heard. The next day it hit the media (see Figure 1).

John Watkins, at the time both Police and Transport Minister, labelled Magistrate O'Shane a 'serial offender' and his claim was repeated in five publications:

'I'm disgusted that a person in such a responsible position as a magistrate should act in such an irresponsible way,' he said. 'Magistrate O'Shane,

unfortunately, is a serial offender when it comes to people in uniform. Our police and our transit officers. What's occurred in the court in this matter is absolutely unacceptable irresponsible behaviour from the magistrate'.<sup>14</sup> We note that O'Shane is demonstrably not a 'serial offender' in the common usage of the term, but that she does deal with such persons every day of her working life.<sup>15</sup>

Holding both portfolios, Mr Watkins represented police and transit officer interests in his statements, standing up for 'the hard-working men and women of the NSW police and CityRail'.<sup>16</sup> In the process, the minister created a new category of people, united by the arbitrary conditions of his ministries and their wearing of uniforms. This new category has the quality of 'hardworking', but excludes other representatives of the law, like Pat O'Shane, whose strongest critics would never accuse her of not being hard-working. Our new category unites two categories that in other respects are very different. The police are employees of the state. RailCorp was deliberately established, by statute, as an entity at arms' length from government.<sup>17</sup> Its security officers are not police. The only police involved were police prosecutors, who took the case and lost it. If magistrates have to rule in favour of the prosecution in every case or be accused of offending the police, the New South Wales justice system would be simpler and more predictable, but less just.

The next move by the minister was reported as a step toward the removal of Pat O'Shane from the bench.<sup>18</sup> This angle was achieved by Mr Watkins himself, in tandem with the media that ran the story, by publicly outlining Judicial Commission processes and powers while calling for a review of *Rose*.

Mr Watkins said it was entirely possible the commission could recommend Parliament consider removing Ms O'Shane from her post, saying 'The conduct division can initiate investigations or hearings and if it finds the complaint justifies removal of the judicial officer, it refers it to Parliament for consideration'.<sup>19</sup>

The rhetoric intensified over the next few days. On 21 January, then-Premier Morris Iemma announced that he would introduce legislation to seat community members on the Conduct Division of the New South Wales Judicial Commission. Such a reconstituted body would still be in a position to recommend the sacking of Magistrate O'Shane to Parliament. Ten days later, New South Wales Chief Justice James Spiegelman drew attention to the fact that this proposed change to the

Judicial Commission was announced by press release and, in a careful mix of the general and the specific, added:

The exercise of judicial power must be insulated, indeed isolated, from pressure or interference by the executive branch of government ... It would be wrong and contrary to constitutional principle if an appointment to a conduct division were to be made by the executive branch of government'.<sup>20</sup>

The *Sydney Morning Herald* published an edited extract of the speech in its opinion pages; and its legal reporter directly linked this to *Rose*.<sup>21</sup> The *Daily Telegraph* political reporter went further, articulating that the minister was at risk of breaching the doctrine of the separation of powers.<sup>22</sup> By now, only sixteen days after the case was decided, it had provoked a clash of Titans, between the leaders of the judicial and legislative branches of government, duly reported, over precisely the issue of the fundamental relationship between them.

In July 2007, a re-elected New South Wales government introduced the *Judicial Officers Amendment Bill* to Parliament. The record shows no doubt as to who was seen as its catalyst. John Ajaka MLC (Lib) said, in part:

[This] bill arose from a situation involving Magistrate Pat O'Shane. In January this year Ms O'Shane came under fire for showing alleged bias against police after she acquitted a person who had been accused of spitting at two rail transit officers. The Premier responded to the public outcry following this matter by announcing, on 21 January 2007, that he would appoint community representatives to the Conduct Division of the New South Wales Judicial Commission.<sup>23</sup>

Dr John Kaye MLC (Greens) went further:

[This bill] arose out of a very public attack against Magistrate Pat O'Shane ... John Watkins whipped up a media frenzy by criticising Pat O'Shane's handling of the Garry Rose case ... [Ms Lee Rhiannon, Greens MLC] commented at the time that election fever must have given Minister Watkins a rush of blood to the head, causing him to forget the principles of judicial independence and the *separation of powers* [our emphasis]. It is inappropriate in the extreme for a Minister to hurl insults at members of the judiciary and comment on their judgments without being privy to all



the evidence. The Lemma Government—in agreement with the Coalition—has been using magistrates as political footballs in its tough on law and order game, and the bill is a result of that ugly tussle. The bill jeopardises judicial independence.<sup>24</sup>

In spite of the debate, the bill was a *fait accompli*, and duly became law.<sup>25</sup> In mapping the curve representing this history, we caution that the values are qualitative not quantitative, highly approximate and indicative, intended only to capture the social scale of the elements involved in the escalation. In July 2006, the players appeared as individual agents, acting at that level. In January 2007, the interaction entered the court system, an enlargement of the sphere of everyday life in any incident. However, while intersections with the court system expand the scope of an incident, there it remains, *unless something else happens*. In this case, something else did happen. Almost immediately, the political sphere intervened and the media sphere intersected. Shortly thereafter, the judicial sphere, represented by the Chief Justice, also intersected. The whole system of the semiosphere had become critical within a fortnight. The incident had leapt far beyond its original confines.

In Figure 2, below, we represent the concluding phase with large circles, to indicate that the scale of the interaction had made a quantum leap. Whole systems

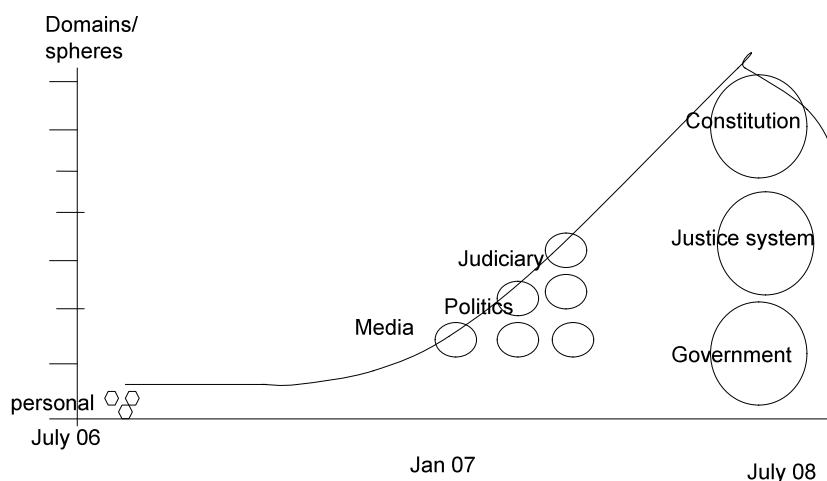


Figure 2: Domains plotted on the power curve 'Pat O'Shane in the media, January 2007'

collided, not just agents of specific spheres. So fundamental was the clash that even constitutional principle was at stake.<sup>26</sup> Looking at the two patterns together we see that the media did have a catalytic effect, but it was not the sole cause, and did not have a consistent tendency. The Power Law in the media spikes played a part in a larger exponential trajectory that reached its culmination outside the media gaze, though still within the semiosphere. The events unfolded as they did because of a complex conjunction in unstable, critical conditions, with many causes and many effects. Critical incident methodology does not offer a simple alternative explanation to any given model, such as one that emphasises the role of the media. On the contrary it is heuristic, pointing to many hypotheses which may co-exist, whose concatenation in this single occasion will be unique in detail and multi-systemic in scale.

In a sense, this analysis is reminiscent of Althusser's concept of over determination;<sup>27</sup> though we raise the stakes and envisage these multiple forms of determinata playing out in a far-from-equilibrium space.

#### —O'SHANE AS CATALYST

In what follows we look at some factors that can plausibly be hypothesised as factors that may explain why this small incident exploded as it did. The first is the newsworthiness of the magistrate's identity. Pat O'Shane is a controversial figure. She has been examined at length for her public roles in academia, feminism, republicanism and media, as well as law.<sup>28</sup>

Pat O'Shane holds a masters degree and an honorary doctorate in law. She is a former Chancellor of the University of New England who has published on issues pertaining to Aboriginal people, women, and an Australian republic. Six stories claimed that O'Shane was the first Aboriginal barrister in NSW, though in fact that honour went to Mullenjaiwakka (aka Lloyd McDermott).

These factors are background to the crucial fact, that Pat O'Shane is an Aboriginal woman. In raw terms, more than half of the stories (12) referred to 'controversy'/'controversial' at least once. Six stories directly identified Magistrate O'Shane as Aboriginal. Two more implied racial identity by context by quoting allegations of racist abuse (from the evidence) alongside the accusation of bias made by the minister.<sup>29</sup>

<i>Pat O'Shane</i>	<i>AND media</i>	<i>AND law</i>	<i>AND controvers*</i>	<i>AND Aborigin**</i>	<i>John Watkins AND controversies*</i>
270	8	6	87	36	53

Table 1: Media store scan for various search terms, 01 January 2007–31 December 2008

Source: Proquest ANZ Newsstand (newspapers only) and Factiva, filtered for duplicates

\* Stemmed search included 'controversy' and 'controversial'

\*\* Stemmed search for 'Aboriginality' included 'Indigenous'

Alongside the two-year study period, we looked at Australian media coverage of Pat O'Shane to gauge the public intellectual (speaking in her areas of expertise such as law, Aboriginality) ratio against the controversial character.

These figures show that Pat O'Shane is indeed a public figure, and that her meaning is to be controversial. We then uploaded the critical incident file to Leximancer to see the picture it gave of the semantic terrain, or a part of the semiosphere. Leximancer algorithms digitally search the corpus for lexical patterns. 'Concepts' are built around co-occurring words, that is, words associated with each other within the data. 'Themes' are formed in the same way around concepts. Theme-size can be varied, so that fewer and fewer themes encompass more and more concepts.

The following map shows how Leximancer saw our corpus, with three mega-themes. The largest one is no surprise, since Pat O'Shane was the central figure, and our search term. But we had not expected Community and Law to be the other main themes. By contrast, 'controversy' had to be inputted manually—it did not emerge automatically. The program then mapped its connections in the main field.

'Controver/sial' is represented as a path leading out from Ms O'Shane, part of the larger theme, her meaning. Thus far this is what we would expect. But Leximancer provides a more precise pathway between concepts, showing the associations that mediate them. So 'controversial' is linked to 'O'Shane' via 'magistrate'. Ms O'Shane is presented as controversial because she is a magistrate. The case itself is controversial by association with her. On the other hand, 'Government', whose representatives' actions were highly controversial, is widely

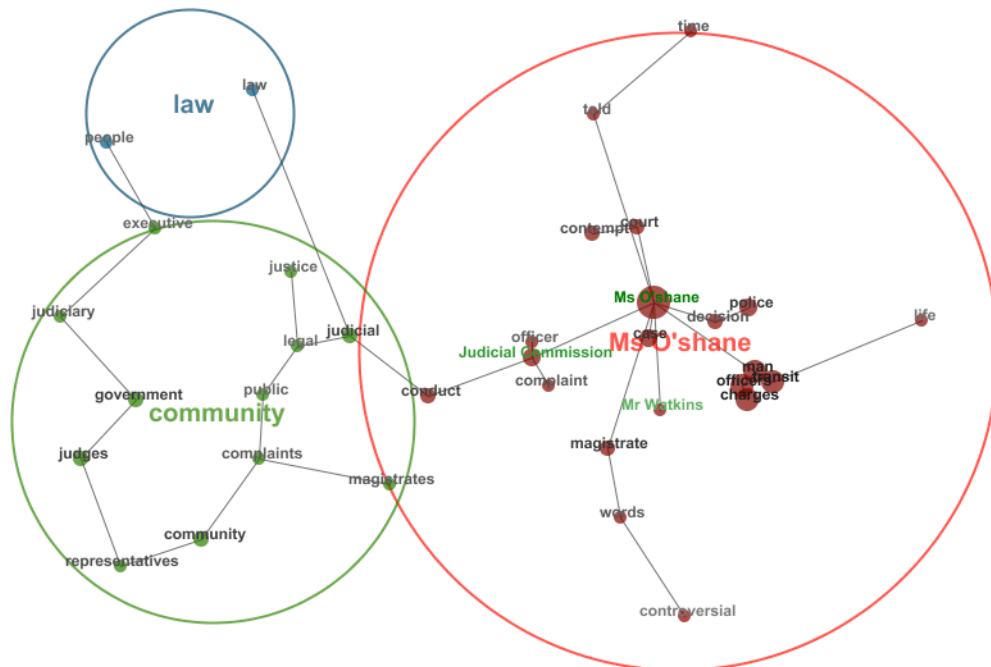


Figure 3: Concept map at 62% theme size to produce a three-body image

separated from the term. These links travel via the magistrate and the Judicial Commission and into a separate sphere.

Putting these together, we say that in this set of stories, Pat O'Shane is the *primary focus* of the controversy; and the case (and its makings, represented by the red cluster nearby that includes 'man', 'charges', and 'transit officers') is *closely associated* with controversy. The government only has distant, weak connections with how the 'controversial-ness' of the incident was reported. Yet government actions played a major role in escalating a minor incident into a full-blown episode. The government (but not so the key government player) escaped more of the mud flowing around than the two Aboriginal players. Mr Watkins, on the other hand, is in close proximity to the case and the magistrate. Yet according to the separation of powers doctrine, this is a place that he ought not occupy.

We now seek to articulate and interpret the field of debate thrown up by this picture of the data. Leximancer labels the products of its algorithms 'concepts' for results which are sometimes like what would be commonly understood by that word, and sometimes not. In the above map, the broadest concept of community includes its representatives: the public, the government, the judiciary. In the 'Ms O'Shane' thematic circle, the minister who wanted to dismiss her is closely embedded in her theme. He is her opponent, yet Leximancer locates him as part of her meaning.

What seems to be going on here is the co-existence of two *kinds* of concept, identified by Vygotsky as 'scientific' and 'complexive'.<sup>30</sup> For Vygotsky, complexive concepts are an earlier form of thought, their components formed by associations. Scientific concepts come later, mostly through education. They are consistent, clearly bounded, and hierarchically organised. We may add: in everyday language they are the exception. Most commonly used words are used in a fuzzy way, with internal contradictions and multiple shades of meaning. In calling such usages 'concepts' the software developer has captured some of this layered quality of language use.

Leximancer, however, is not based on Vygotsky's ideas. Instead, it reflects a fact about this discourse: that certain concepts travel together in close association. In everyday language, this means that the idea of O'Shane is contingent on the company she keeps. Her identity is given by the relationships between her and these key others, in this scenario arising out of hostility and struggles. Likewise, Minister Watkins does not have a pre-existing 'essential' identity in this corpus. Although he is a government minister, and owes his importance in the story to that fact, the links between him and government are neither proximate nor straightforward. Rather, his identity and meaning come primarily from his interactions with O'Shane. He is not Mr John Watkins, Minister of the Crown, Member for Ryde; but the one who is confronting Magistrate Pat O'Shane. Within the parameters of this data set, his connection to government is overlaid by closer connections established in the heat of battle.

Yet 'government' is embedded with its presumed opposite, Community. Here are a number of potentially related terms, such as 'public', and 'representatives'; but it is symptomatic that the closest associations to 'community' are with 'complaints'

and ‘government’. This sphere is populated by bodies the community complains to, or about; or perhaps feels are indifferent to them. The dominance of Community reflects the place in the story flagged for the community by others for varied purposes. This loosely defined, un-consulted community is destined for representation on the Conduct Division of the Judicial Commission—whether they like it or not.

The Law sphere was so thinly populated (with a single concept) as to require closer inspection of the relevant text, which is hyperlinked by Leximancer. It transpired that Law as a theme was shaped by the language-use of the Chief Justice, who said ‘people’ where others would say ‘the community’. Rating each concept in terms of a positive or negative relationship to its theme, we find:

<i>Concept</i>	<i>Positive</i>	<i>Negative</i>	<i>Ratio</i>
O’Shane	3	13	19 %
Community	2	8	20 %
Law	1	1	50 %

Table 2: Positive to negative ratio of concepts to three major themes

The two major themes are constituted by what is opposed to them by a ratio of 4:1. The discursive environment is hostile to O’Shane and to Community: both are strongly contested. We can also generalise to the rest of this field of meanings. Most concepts are similarly constituted by that to which they are opposed. So, for instance, ‘government’ is closely linked to ‘judges’, but in this field of meanings it is because their relationship involves a deep struggle. We are describing rather than condemning this picture: the struggle can reflect the democratic tradition of checks and balances intended to guard against arbitrary use of power by either party. Yet there is a less obvious interpretation. In a situation like this, ‘concepts’ tend to lose their fixed identity and predictable set of associations. They are overtaken by a more ad hoc, dynamic set of relationships, mostly negative. They become, in short, more chaotic. The condition of language comes to mirror the chaotic state precipitated by the critical incident.

To unpack this picture, we firstly test an obvious hypothesis: that Aboriginality played a key role in turning a petty moment into a critical incident. Both the controversial magistrate and the man she controversially acquitted were Aboriginal. Racism, overt or covert, has an abundantly demonstrated—and complex—presence in Australian culture.<sup>31</sup> Examining the affair in the light of critical incident theory, we found indicators that racism played so subtle a role as to need some kind of non-linear framework to make sense of the layers of meaning.

Pat O’Shane’s Aboriginality was identified explicitly in one quarter of the stories. In other words, this identity was well reported, and marked her as different in this way. Mr Watkins was not once referred to as White (or non-Aboriginal), although he is as much White as Pat O’Shane is Aboriginal. The way the references to Pat O’Shane’s Aboriginality were managed reflects that as an Aboriginal woman who is a magistrate, O’Shane defies the norm:

The fact that the overwhelming number of our judges and magistrates are—and always have been—politically and socially conservative middle-aged men of Anglo-Celtic background has meant that the world views, social mores, tastes and general sensibility common to such people have become accepted as natural, uncontroversial, and ‘the law’.<sup>32</sup>

In this context, to emphasise O’Shane’s Aboriginality could be *anti-racist*, countering the ‘down-and-out’ stereotypes so often seen in the news, making her a role model for Aboriginal people, or for a non-racist Australia. However, in this data, Aboriginality is associated with the argument that Pat O’Shane is a bad magistrate. So, more probably, the opposite is implied (look what you get when you go against what is ‘natural’ and appoint an Aboriginal woman as magistrate).<sup>33</sup> Yet this message comes in a carefully ambiguous form, making it harder to prove the existence of racism.

‘Aboriginal’ initially did not occupy a large place in the thematic structure, but when we seeded the term, it developed its own theme, (third only to O’Shane and Community).

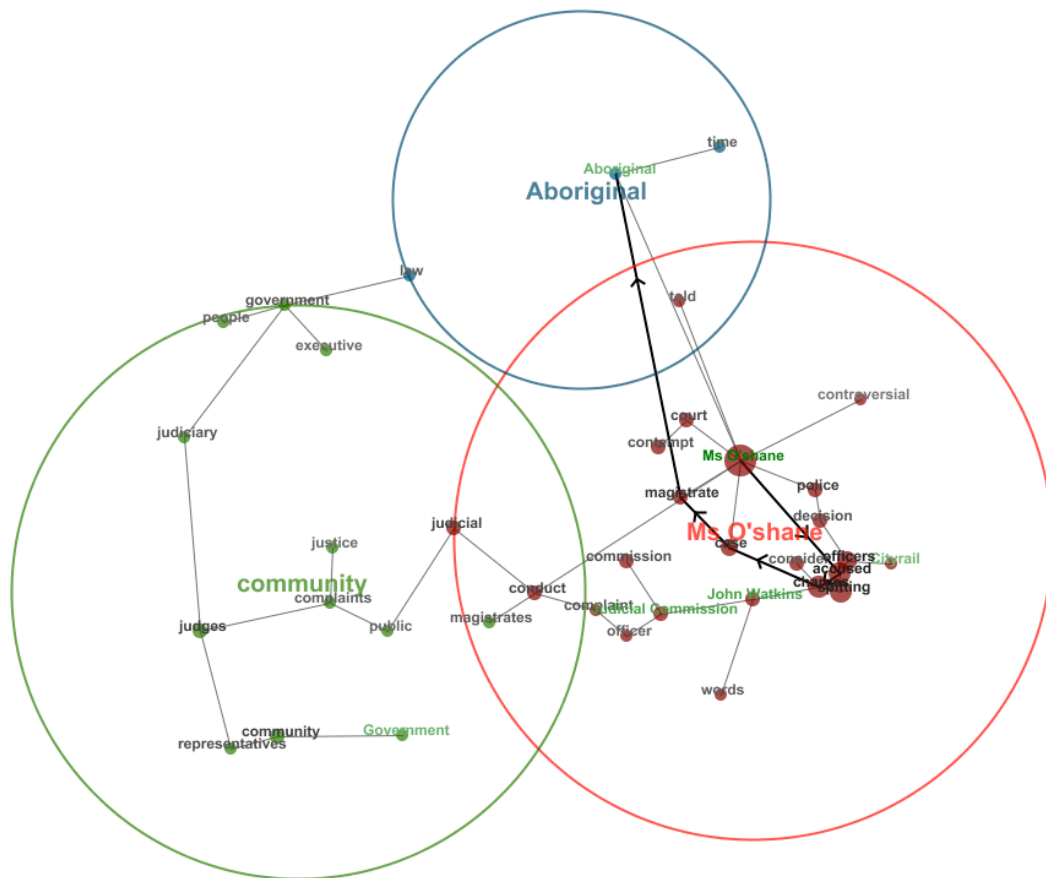


Figure 5: Path from Ms. O'Shane to Aboriginal through 'accused', 'spitting', 'charges', 'case' and 'magistrate' (cutting past 'contempt [of] court')

At first it may be surprising to find that Garry Rose is not directly referred to as Aboriginal, although on two occasions there are quotes, from the evidence, of racist abuse against him which sufficiently imply this fact. Otherwise, basic word frequency results could be taken to demonstrate that on this occasion the media behaved with scrupulous responsibility, avoiding the inflammatory spectacle of a confrontation between White law and authority on the one hand and an Aboriginal magistrate complicit with an Aboriginal offender on the other. We used pathway analysis to examine these possibilities more closely.

We note that Aboriginal replaces Law, which becomes part of the Aboriginal theme, on its margins, instead of being at the centre of its own theme. This is another 'affinity between opposites' as described earlier. Aboriginal in these texts is a polemic concept, so unstable that a slight adjustment to the parameters embeds



'law' within its theme circle. While seemingly remote in meaning, we note that Aboriginal people have closer—and far more destructive—experiences of the law than most Australians.

As expected, Aboriginal connects with the O'Shane theme, with a minor though surprising twist. Its pathway passes to Ms O'Shane, the person, through her role. This implies that she is first an Aboriginal magistrate, not an Aboriginal person. One reason may be that to name a person as Aboriginal risks being regarded as racist. It may be banned by media protocols, which would also account for the fact that Garry Rose is not racially identified. To split a person in an office into the two categories, person and office (whereas in the legal world the person becomes the office, the magistrate *is* the court), allows the racial information to be given as if it were neutral, not attached to the person. To do the same to the Aboriginal defendant would be too blatant to get away with. Rose mostly loses his name, a form of dehumanisation itself, but does not become 'Aboriginal'. He is just 'the man'.

—HOTSPOTS: IS REDFERN A CRITICAL SITE?

Aboriginal people live under greater surveillance than any other group in Australia.<sup>34</sup> The media, the government, the police, and the general population all participate in this scrutiny. Most if not all Aboriginal people avoid uniformed officers where possible, due to myriad historical and contemporary factors. Police were key actors in forcibly removing Aboriginal children from their families, causing the Stolen Generations.<sup>35</sup> Their role in the over-representation of Aboriginal people in prisons is well documented,<sup>36</sup> as are the other causes, which amount to dispossession and oppression in all their manifestations.<sup>37</sup> These elements, directly or through kin networks, impact on every Aboriginal person in Australia.<sup>38</sup>

Redfern, the site of the alleged assault that germinated into our critical incident, is the heart of urban Aboriginal Australia, a ghetto to some, modern sacred site to others.<sup>39</sup> Perched on the edge of the glittering, global Sydney CBD, next door to Australia's oldest university, Redfern is home to a mix of white and blue collar workers, student households, and an Aboriginal community that has survived multiple, and at times insistent, attempts to remove them.<sup>40</sup> Across from Redfern station is the Block, the first Aboriginal-owned urban neighborhood in Sydney, established in 1973 by the Whitlam government. As with other waves of labour

migration to Redfern, the Aboriginal community grew around the rail yards and the affordable housing that was built for railway workers in the 1880s.<sup>41</sup>

Garry Rose's connection with this history is not stated explicitly in the archive, but he carries many typical indicators: an Aboriginal male, travelling to Redfern, in conflict with (non-state and state) officers of the law. We have mentioned the two references that sufficiently imply that Rose is Aboriginal, while eluding a rule against racist labels, or perhaps in line with best practice responsible reporting. The same text could be seen as 'dog whistle politics'.<sup>42</sup> The capacity of dogs to hear sound pitched outside the human range allows whistlers to seem innocent to their human neighbors, while commanding their dogs to do their will. Or, in a complex world, both could be true, with whistlers being innocent to some degree. An inaudible sign of Aboriginality is mention of Redfern, the site of the assault. If the intended audience is white Australian Sydney-siders, specific statements connecting Redfern and the dominant part of its meaning, Aboriginality, are superfluous.<sup>43</sup>

Redfern had been the site of another, more dramatic critical incident only a year before. In February 2004 a 17-year-old Aboriginal youth died in a bicycle accident precipitated by the fact that a police van was behind him. His death was unspeakably graphic. The first of three demonstrations of serious unrest in Sydney between February 2004 and December 2005 occurred in light of the tragedy. High tension between the community and the police ensued, reported as a riot.<sup>44</sup>

#### —FLASHPOINTS, HOTSPOTS, AND CRITICAL INCIDENT ANALYSIS

Critical incident analysis is framed by complexity theory, which recognises multiple causal strands as typical in social life, not to be reduced to a single causal explanation. The causal explanations we discussed above are not alternatives, and we do not want to choose between them. Instead, we review the connections that have been made in the larger field constituted by Magistrate Pat O'Shane and other key elements in this critical incident.

The incident site may have been a precipitating factor, in addition to the associations we have noted. In our larger project sample we found that incidents at iconic locations trigger higher media spikes and/or greater density (coverage by volume and over time). The most prominent of these was the Sydney Harbour Bridge. Random events at such hotspots seem more likely to produce the intense

media interest that is a critical incident sign, contributing to their visibility and, ultimately, the effects.

On the contrary, there were also elements whose effect was rendered invisible. In delivering her decision, Magistrate O'Shane said that, 'having made a lot of searches of the law', she was unable to locate the authority for transit officers to lawfully handcuff the defendant outside Redfern Station.<sup>45</sup> This basis for her decision *in law* went entirely unreported, yet it goes to the heart of the issue: was Rose committing assault or resisting false imprisonment? Do paralegal officers have the same authority as police? Minister Watkins specifically elided this distinction. Yet the decision has not been overturned on legal grounds, so there can be a presumption that Magistrate O'Shane was correctly upholding the law, not bending it to fit her agenda as was claimed.

Ten years earlier, Poynting et al. looked at an O'Shane decision in the context of media-driven moral panics. The magistrate had found in relation to two Lebanese Australian youth that 'the police had no lawful reason to stop these men when they did'.<sup>46</sup>

There was an outcry from press, police spokesmen, and politicians, but it was directed at the magistrate rather than the police. 'The DPP overruled the decision a fortnight later by issuing an ex-officio indictment', reported the *Daily Telegraph* announcing the eventual gaoling of one of the young men.<sup>47</sup>

Moral panic theory, first developed by British sociologists Jock Young and Stanley Cohen, is an interesting reference point for critical incident analysis.<sup>48</sup> The theory has proved attractive because it puts non-linear, runaway phenomena on the agenda. Without articulating the term 'critical incident analysis', and before the Butterfly Effect was known in sociology, these theorists legitimated the sociological analysis of non-linear rationality.

We do not propose here to set these theories in a competition from which only one will survive. One of us has used moral panic theory to make sense of explosive racist events in Australia.<sup>49</sup> Moral panics can be seen as particular kinds of critical incident, whose particular trajectory is well studied and accepted in the sociology of racism. By setting moral panics in the broader category of critical incident analysis we are able to use this work, while also pointing out certain unique features in incidents like the present one. Here there was only muted panic compared, for

instance, with the Redfern riots, or the racially charged riot in Cronulla, December 2005. The events are not unrelated around our catalytic character:

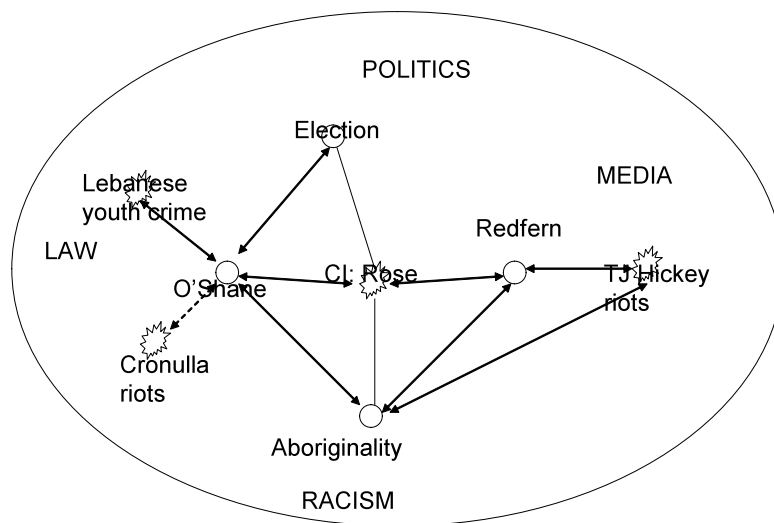
Up till now police have arrested people for urinating on the street or for swearing at police. They have gone before courts and the courts have found that the objective standard is formulated by people like Pat O'Shane. I suggest, if honourable members read the judgments of Pat O'Shane and what the *Daily Telegraph* says, her standard of reasonable behaviour does not accord with what the general public expects...<sup>50</sup>

These words from Malcolm Kerr MLA (Lib—Cronulla) link Pat O'Shane to Cronulla so loosely that the sentiment would only seem relevant to someone whose mind is in a far-from-equilibrium condition. The same conditions are needed to make sense of the logic that blends the judgements of magistrates with views espoused by a popular newspaper. Further reading does not reveal what Kerr meant by 'people like Pat O'Shane'. It is safe to assume that he did not mean pioneering Aboriginal women who, despite a background of severe disadvantage, have risen to become leaders in our institutions. One such woman, Linda Burney MLA (ALP—Canterbury), interjected '[This is] not an analysis of the Cronulla riots. I ask that the member be drawn back to the [Appropriation] bill.'<sup>51</sup>

One final factor that was mentioned in the debate, as a possible cause of critical conditions, is that a (fixed term) election was due two months after this incident.<sup>52</sup> As Chief Justice Spigelman noted: 'The white heat of an election campaign is not a propitious time to debate matters of principle.'<sup>53</sup> Pat O'Shane agreed: 'In a statement to the ABC yesterday, Ms O'Shane said she had nothing to say. But she noted that there is an election coming up.'<sup>54</sup>

Far from wanting to trace everything that happened to a single cause (Garry Rose's gob, Magistrate O'Shane's status) our intention is the opposite: to sketch the irreducible complexity of many factors as they interact. We model some of these in Figure 4, below.

This map has a similar form to the Leximancer maps we have used elsewhere, for good reason. These elements and incidents are shown as linked in a network. Each link is reciprocal, such that influence flows in both directions, though not always equally. So, for instance, Magistrate O'Shane affected Rose, and Rose affected O'Shane. Both were affected by Aboriginality, and in turn the conception of



Networks of criticality: Sydney 2005-2009

Figure 4: Networks of criticality, Sydney, 2005–2009

Aboriginality itself was affected, so minutely that it would be impossible to measure, unless, as in this case, it was one of the initial conditions in a critical incident.

The Rose critical incident is at the centre of Figure 4 only because it is at the centre of our interest. In this network we indicate how thickly it is directly connected to four other nodes. However, it is also connected to three other nodes of meaning, O'Shane, Redfern and Aboriginality, which then make connections with all three others, at one remove.

O'Shane is the most richly connected node in this field, across three of the four critical incidents we have mapped (though her connection with the Cronulla incident is weak, as indicated by the dotted line, created by the parliamentary comment). In this respect we could see her as in some sense playing a causal role in the way the episode unfolded, as we have recounted it. It is unlikely, on the face of it, that this minor case would have had such an impact if heard by any other magistrate.

In the diagram we have also shown the three main institutions affected by this incident, which in all cases were brought into an uncomfortably close relationship with one or more of the others. The confusion of law with politics as proscribed by

the doctrine of separation of powers was explicitly debated. So was the role of the media, especially its use by the government to make announcements about judicial arrangements.

We have included the theme of racism, which was invoked in the three other critical incidents, but not in this one. We have shown how carefully the media handled the theme of racism, so unlike the other cases. There is no clear-cut evidence from the data that it played a decisive role. Yet the connections suggest that it did play a subterranean role, so disguised that it needed a more subtle form of analysis, inserted in a framework that allows for complex, contradictory, causal links and processes.

#### —CONCLUSION

Our analysis of critical incidents has obvious limitations. For instance, most incidents that make up life in 'normal' times do not go critical, and in far-from-normal times there are too many to know which ones to concentrate on in detail, as we have done here. Each critical incident in itself typically seems too small and transitory to invest so much research into it, and too unique to allow the generalisations that social scientists demand.

Yet we offer critical incident analysis as a useful addition to the repertoire of critical social analysis in spite of these limitations. Precisely because critical incidents are typically so small yet generate such public interest it is possible to carry out directed yet open empirical research, taking abstract and abstruse ideas from chaos and complexity into the vast and interconnected complexities of the everyday world. It looks for a fresh balance in each case between certainty and uncertainty. In the local case it is never possible to be sure what did or did not happen, or whether that matters. The larger systems reveal new and unexpected properties as they are put under stress, but the 'whole system' is at best glimpsed or projected from interpretations about critical incidents.

As an embryo research program, or guide to action, critical incident analysis needs other more systematic approaches to complement it, to follow up the lines of enquiry it suggests. Yet it does some things that these more comprehensive approaches need. Above all it provokes questions and raises doubts about the

'whole system' underpinning the factors which combine to produce the unique flap of butterfly wings that can set off an earthquake.

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—NOTES

<sup>1</sup> *Police v Rose* (2007) Local Court 46/07, 15 January 2007. Transcript ACS: SND Z57-F1 obtained from Downing Centre, 27 January 2009.

<sup>2</sup> *Police v Rose* (2007) p. 3 at 5.

<sup>3</sup> Edward N. Lorenz, *The Essence of Chaos*, University College London Press, London, 1993.

<sup>4</sup> Australian Research Council grant for project titled Putting Humanities to Work in a Chaotic World: Dynamic Interdisciplinarity and Community Engagement.

<sup>5</sup> John Urry, *Global Complexity*, Polity Press, Cambridge, 2003; Brian McNair, *Cultural Chaos: Journalism, News and Power in a Globalised World*, Routledge, New York, 2006; John Law, *Complexities: Social Studies of Knowledge Practices*, Duke University Press, Durham, 2002. See also T.R. Young, 'Chaos Theory and Symbolic Interaction Theory: Poetics for the Postmodern Sociologist', *Symbolic Interaction*, vol. 14, no. 3, 1991, pp. 321–34.

<sup>6</sup> We searched major Australian newspapers and ABC News Online, for 'RailCorp OR CityRail' on the Factiva database.

<sup>7</sup> RailCorp was decorporatised after a New South Wales Independent Commission Against Corruption investigation. See *Transport Administration Amendment (Rail and Ferry Transport Authorities) Act 2008* (NSW).

<sup>8</sup> The initial study period was 1 January 2007 to 31 December 2008. We have continued to monitor major transport issues because not all interviews with key players were completed in that time.

<sup>9</sup> Ilya Prigogine and Isabelle Stengers, *Order out of Chaos: Man's New Dialogue with Nature*, Bantam, New York, 1984.

<sup>10</sup> Per Bak, *How Nature Works: The Science of Self-organized Criticality*, Springer, New York, 1996.

<sup>11</sup> On the evolution of critical incident research methods, see L. Butterfield, W. Borgen, N. Amundson and A. Maglio, 'Fifty Years of the Critical Incident Technique: 1954–2004 and Beyond', *Qualitative Research*, vol. 5, no. 4, 2005, pp. 475–97.

<sup>12</sup> Per Bak.

<sup>13</sup> See <<http://www.dailytelegraph.com.au/news/nsw-act/oshane-leaves-us-gobsmacked/story-e6freuzi-111112834819>>; accessed 14 December 2009.

<sup>14</sup> ABC News Online, 16 January 2007, <<http://www.abc.net.au/news/newsitems/200701/s1828107.htm>>; accessed 14 December 2009; see also Lisa Davies, 'O'Shane Makes Another Miscreant's Day', *Daily Telegraph*, 16 January 2007; 'Pat O'Shane Angers Authorities Again', *The West*, 16 January 2007; Simon Hayes, 'Magistrate Faces Acquittal Probe', *Australian*, 17 January 2007; Imre Salusinszky, 'Fighting for Justice', *Australian*, 31 January 2007.

<sup>15</sup> See Eileen Baldry, 'Recidivism and the Role of Social Factors Post-release', *Precedent*, vol. 81, 2007, pp. 4–7; Jason Payne, *Recidivism in Australia: Findings and Future Research*, Australian Institute of Criminology Research and Public Policy Series no. 80, Canberra, 2007.

<sup>16</sup> Tim Dick, 'Politicians Told to Stop Attacks on Sentencing', *Sydney Morning Herald*, 19 January 2007, p. 3.

<sup>17</sup> *Transport Administration Amendment (Rail Agencies) Act 2003* (NSW).

<sup>18</sup> *Age*, 17 Jan 2007; *Daily Telegraph*, *Sydney Morning Herald* and *Courier Mail*, 18 January 2007; *Australian*, 31 January 2007.

<sup>19</sup> Lisa Davies, 'O'Shane Faces Sack: Historic Axe Hangs Over Magistrate', *Daily Telegraph*, 18 January 2007.

<sup>20</sup> James Spigelman, CJ, QC, Speech, Law Society of New South Wales, Sydney, 2007, <[http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_spigelman290107](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman290107)>; accessed 14 December 2009.

<sup>21</sup> Jim Spigelman, 'A Judge's Lot to Protect Independence', *Sydney Morning Herald*, 30 January 2007, <<http://www.smh.com.au/news/opinion/a-judges-lot-to-protect-independence/2007/01/29/1169919273560.html?page=fullpage#contentSwap1>>; accessed 14 December 2009; Tim Dick, 'Top Judge Takes Government to Task', *Sydney Morning Herald*, 30 January 2007, <<http://www.smh.com.au/news/national/top-judge-takes-government-to-task/2007/01/29/1169919274725.html>>; accessed 14 December 2009.

<sup>22</sup> Joe Hildbrand and Lisa Davies, 'Outrage over O'Shane "Bias"—Police Minister Calls for Inquiry', *Daily Telegraph*, 17 January 2007, p. 7.



- <sup>23</sup> *Judicial Officers Amendment Bill 2007* [Second Reading] 4 July 2007, NSW Hansard, p. 2046: <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LC20070628055>>; accessed 14 December 2009.
- <sup>24</sup> NSW Hansard, p. 2046
- <sup>25</sup> *Judicial Officers Amendment Act 2007*(NSW): <<http://www.legislation.nsw.gov.au/sessionalview/sessional/act/2007-37.pdf>>; accessed 14 December 2009.
- <sup>26</sup> Spigelman, p. 7.
- <sup>27</sup> Louis Althusser, *For Marx*, trans. Ben Brewster, Penguin, London, 1969.
- <sup>28</sup> Sandra Lilburn, *Representations of Feminism in the Australian Print Media: The Case of Pat O'Shane*, Australian National University, Canberra, 2002, <<http://dspace.anu.edu.au/bitstream/1885/41414/2/lilburnpaper.pdf>>; accessed 14 December 2009.
- <sup>29</sup> Lisa Davies, 'O'Shane Leaves Us Gobsmailed', *Daily Telegraph*, 16 January 2007, p. 11; Tim Dick, 'One in the Eye for Magistrates after Alleged Railway Spitter Walks Free', *Sydney Morning Herald*, 17 January 2007, p. 7.
- <sup>30</sup> Lev S. Vygotsky, *The Collected Works of L.S. Vygotsky Vol. 1: Problems of General Psychology*, trans. Norris Minick, Plenum, New York, 1987.
- <sup>31</sup> James Forrest and Kevin Dunn, 'Racism and Intolerance in Eastern Australia: A Geographic Perspective', *Australian Geographer*, vol. 37, no. 2, July 2006, pp. 167–86.
- <sup>32</sup> David Weisbrot, *Australian*, 22 January 1993. In Lilburn, p. 6.
- <sup>33</sup> See Margaret Thornton, "'Otherness" on the Bench: How Merit is Gendered', *Sydney Law Review*, vol. 16, 2007 <<http://www.austlii.edu.au/au/journals/SydLRev/2007/16.html> >; accessed 27 August 2009.
- <sup>34</sup> Rose Lovelock, personal communication, Armidale, NSW, 27 May (Sorry Day) 2000.
- <sup>35</sup> Ronald Wilson and Mick Dodson, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (HREOC), Sydney, 1997.
- <sup>36</sup> John Williams-Mozley, *Explanations of Police Racism*, Oodgeroo Unit Indigenous Research Forum, Queensland University of Technology, Brisbane, 30 October 1998.
- <sup>37</sup> National Indigenous Drug and Alcohol Committee, *Bridges and Barriers: Addressing Indigenous incarceration and health*, Australian National Council on Drugs, Canberra, 2009. <[http://www.nidac.org.au/publications/pdf/nidac\\_bridges\\_and\\_barriers.pdf](http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf)>; accessed 18 August 2009.
- <sup>38</sup> Rose Naylor, personal communication, Armidale, NSW, 2002.
- <sup>39</sup> Wendy S. Shaw, 'Ways of Whiteness: Harleminising Sydney's Aboriginal Redfern', *Australian Geographical Studies* vol. 38, no. 3, 2000, pp. 291–305.

- <sup>40</sup> Nami Kwon, *Tough Times for Sartor*, REDWatch, *The South Side News*, 12 December 2005: <<http://www.redwatch.org.au/media/051212ssn2/?searchterm=sartor> > Access date 27 August 2009.
- <sup>41</sup> Aboriginal Housing Company, *BC: Before Cook and Colonisation*, Sydney, 2009. <<http://www.ahc.org.au/history/history.html>>; accessed 18 August 2009.
- <sup>42</sup> Josh Fear, *Under the Radar: Dog-whistle Politics in Australia*, The Australia Institute, Canberra, 2007.
- <sup>43</sup> Andrew Jacobowicz, *Racist Violence, Racism and the Media* (unpublished manuscript, commissioned by the National Inquiry into Racist Violence, Human Rights and Equal Opportunity Commission, Sydney, 1990).
- <sup>44</sup> Chris Cunneen, 'Riot, Resistance and Moral Panic: Demonising the Colonial Other', in Scott Poynting, and George Morgan (eds), *Outrageous! Moral Panics in Australia*, ACYS Publishing, Hobart, 2008, pp. 20–9. Also see, for example, *Sydney Morning Herald*, 28, 21, 09, 6 and 5 March; 16--5 (inclusive) and 29 February.
- <sup>45</sup> *Police v Rose* (2007), Local Court 46/07, Transcript, 15 January 2007, p. 5.
- <sup>46</sup> Scott Poynting, Gregory Noble and Paul Tabar, 'Middle Eastern Appearances: "Ethnic Gangs", Moral Panic and Media Framing', *The Australian and New Zealand Journal of Criminology* vol. 34, no. 1, 2001, pp. 67–90.
- <sup>47</sup> Poynting, Noble and Tabar, p. 84.
- <sup>48</sup> Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, third edition, Routledge, London and New York, 2002.
- <sup>49</sup> Bob Hodge and John O'Carroll, *Borderwork in Multicultural Australia*, Sydney, Allen and Unwin Academic, 2006.
- <sup>50</sup> NSW Hansard, *Appropriation (Budget Variations) Bill* (Second Reading), NSW Parliament, Sydney, 4 May 2006.
- <sup>51</sup> NSW Hansard, 4 May 2006.
- <sup>52</sup> *Constitution (Fixed Term Parliaments) Amendment Act 1993* (1995 No. 1) (NSW).
- <sup>53</sup> Spigelman, p. 7.
- <sup>54</sup> ABC News Online, 'Rail Spitting Ruling Angers Police Minister', 17 January 2007 <<http://www.abc.net.au/news/stories/2007/01/17/1828234.htm>>; accessed 15 December 2009.